

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 SHERMAN DIVISION

4 IN RE: §
5 CHARLES DEAN HOOD, § CIVIL ACTION
6 PETITIONER § NO. 4:08-cv-334; 4:08-cv-336
7 _____ §

8 **RESPONSE TO PETITIONER'S EMERGENCY MOTION TO REMAND**

9 COMES NOW, THE HONORABLE VERLA SUE HOLLAND, and files this
10 Response to Petitioner CHARLES DEAN HOOD's Emergency Motion to
11 Consolidate and Remand Immediately, and for Costs, and would
12 respectfully show the following.

13 **Summary of Argument**

14 1. Respondent properly removed Mr. Hood's Rule 202 Petition
15 filed in the 366th District Court, Collin County, Texas for the
16 reason that the Eastern District of Texas has established that such
17 a Petition is a "civil action" within the meaning of 28 U.S.C.
18 §1441, In Re: Texas, 110 F.Supp.2d 514, 520-521 (E.D. Tex. 2000),
19 *reversed on other grounds*; In Re: State of Texas v. Real Parties in
20 Interest, 259 F.3rd 387, 395 (5th Cir. 2001). The basis of Mr.
21 Hood's claim in his Rule 202 Petition is a violation of civil
22 rights under 42 U.S.C. §1983. U.S. District Courts have original
23 jurisdiction over violation of civil rights claims, especially
24 alleging such a violation by a Judge and prosecutor. 28 U.S.C.
25 §1331. Therefore the matter may be removed pursuant to 28 U.S.C.

1 §1441.

2 **Mr. Hood's Civil Action Under Rule 202 is a Subterfuge**
3 **to the Real Purpose of His Rule 202 Petition**

4 2. Mr. Hood alleges the existence of a romantic relationship
5 between the former presiding Judge of the 296th Judicial District
6 Court, The Honorable Verla Sue Holland, who presided over
7 Petitioner's capital murder trial in 1990, and Thomas S. O'Connell,
8 Jr., the former District Attorney of Collin County who participated
9 in the capital murder prosecution. Petitioner seeks to depose
10 Judge Holland and Mr. O'Connell for the following reason:

11 (See Notice of Removal, Index of State Court File, Exhibit 4,
12 Petition to Take Depositions Under Rule 202, p. 3).

13 "to investigate potential actions civil in nature against
14 one or both persons, including but not limited to claims
under 42 U.S.C. §1983, for violation of civil rights."

15 3. Mr. Hood is scheduled to be put to death September 10,
16 2008.

17 4. Petitioner also alleges that an undisclosed intimate
18 relationship could taint the validity of numerous judgments,
19 convictions, and sentences in Collin County including Petitioner's.
20 Petitioner requests that the Rule 202 depositions be granted so
21 they may yield evidence pertinent to potential habeas corpus
22 proceedings and serve as a basis for initiating other proceedings
23 civil in nature such as bar complaints or complaints to the State
24 Commission on Judicial Conduct. (See Notice of Removal, Index of
25 State Court File, Exhibit 4, Petition to Take Depositions Under

1 Rule 202, p. 5).

2 5. On August 18, 2008, this matter was originally filed in
3 County Court at Law No. 2, Collin County, and then transferred to
4 the 199th District Court before The Honorable Robert T. Dry, Jr.

5 6. On August 21, 2008, the Criminal District Attorney of
6 Collin County, Texas filed its Motion to Correct Misnomer of
7 Pleadings and File a Subsequent Habeas Petition (Notice of Removal,
8 Index of State Court File, Exhibit 6).

9 7. On August 22, 2008, Judge Dry filed a letter/Order,
10 severing any part of the Petitioner's Rule 202 Motion that has to
11 do with the murder conviction and filed it in the 296th District
12 Court. (See Notice of Removal, Index of State Court File,
13 Exhibit 14, Petition to Take Depositions Under Rule 202, p. 5).

14 8. Therefore, any expedited relief that may be requested or
15 required due to Petitioner Hood's scheduled execution date of
16 September 10, 2008, may be pursued and brought in the 296th District
17 Court as a petition for habeas corpus.

18 **Hood Has Failed to Follow Proper Criminal Procedures**

19 9. To date, Petitioner has failed to avail itself of Judge
20 Dry's severance of this matter; and Mr. Hood has failed to pursue
21 his complaints in the 296th Court. Therefore, the Court should not
22 consider these expedited motions in the civil matter until properly
23 briefed, and argued.

24 10. Petitioner is alleging claims that go much beyond Mr.
25 Hood's conviction, and as a result, Judge Holland and Mr.

O'Connell, should be afforded every opportunity under the law to defend themselves and protect their interests in the civil action.

Ex Parte Charles Dean Hood

11. Moreover, the information that Petitioner seeks to obtain is to whether or not there was a improper relationship between the Judge and the prosecuting District Attorney has been the basis of Petitioner's Application for Writ of Habeas Corpus and Stay of Execution. In the case of Ex Parte Charles Dean Hood, 2008 WL 2487794 (Tex. CRN. App.) (copy of case attached hereto as **Exhibit "1"**, the Petitioner alleged he was denied a fair trial because of an alleged relationship between the Judge and the Prosecutor).

12. Mr. Hood asserts the relationship was "common knowledge" at the time of trial; however, Mr. Hood never raised their allegations in his early appeals. (See Summary of Criminal Proceeding attached as **Exhibit "2"**). Mr. Hood was sentenced to death August 29, 1990. The conviction and death sentence were affirmed on direct appeal on November 24, 1993. On April 21, 1999, Petitioner filed an initial Application for Writ of Habeas Corpus, but did not raise the present allegations of the relationship between the Judge and Prosecutor. Petitioner filed a subsequent Application in trial court for Writ of Habeas Corpus which also failed to raise the present allegation, which was also dismissed April 13, 2005. On June 22, 2005, Applicant filed a second subsequent Application for Writ of Habeas Corpus and that again

1 failed to raise the present allegation. The Appellate Court
2 remanded to the convicting court for resolution of the asserted
3 claim. When the case was returned to this Court, the Texas
4 Criminal Appeals held that Mr. Hood had not met his requirements
5 for consideration of subsequent claims and dismissed his
6 application. On May 6, 2008, Applicant moved this Court to
7 reconsider his direct appeal which was denied. On June 16, 2008,
8 the Texas Criminal Appeals dismissed Petitioner's claim as an abuse
9 of the Writ and denied leave to file an Original Application for
10 Writ of Habeas Corpus or an Application for Writ of Prohibition and
11 also denied Petitioner's Motion for Stay of Execution.

12 **Mr. Hood's Rule 202 Petition is a**
13 **"Civil Action", in the Eastern District of Texas**

14 13. Contrary to the holding in In Re Texas, supra, Petitioner
15 cites several cases from other U.S. District Courts for the rule
16 that a Rule 202 Petition is not a "civil action" for the purposes
17 of removal. The lead case cited by Petitioner is the case of
18 Mayfield-George v. Texas Rehabilitation Commission, 197 F.R.D. 280
19 (N.D. Tex. 2000). District Court Judge Kendall, specifically
20 refers the Eastern District Court Judge Folsom's opinion in In Re
21 Texas but distinguishes it on the basis that Judge Folsom was faced
22 with the multi-billion dollar tobacco litigation settlement and the
23 removal was based on the All Writs Act. However, Judge Kendell in
24 Mayfield-George, supra, fails to conduct the in-depth analysis as
25 to what is a "civil action", as conducted by Judge Folsom in In Re:

1 Texas. Judge Folsom's opinion details his thorough analysis of the
2 removal statute, 28 U.S.C. §1441. Judge Folsom goes back to the
3 first removal provision in the Judiciary Act of 1789, quotes Chief
4 Justice Marshall and Chief Justice Taft of the United States
5 Supreme Court; and determines that the U.S. Supreme Court has
6 broadly construed the various terms used to describe removable
7 proceedings and defines a removable proceeding as one in which
8 there are one or more of the following:

9
10 "a dispute between parties; a prayer for relief (either
11 at law or in equity); pleadings; a tribunal with power to
12 determine questions of law and fact; the determination of
the tribunal is subject to review; and enforceable
orders. A removable proceeding is considered brought
once the party is subject to court orders."

13 14. In contrast, Judge Kendall in Mayfield-George, supra,
14 cites two federal district court cases in Alabama and Florida to
15 support its position and then argues without supporting citation
16 that the Rule 202 Petition to Take a Deposition is not a civil
17 action on which federal district courts have original jurisdiction
18 founded on a claim or right arising under the Constitution,
19 treaties or laws of the United States.

20 15. Petitioner alleges that there is no basis of original
21 jurisdiction in Mr. Hood's Rule 202 Petition. Again, the Petition
22 clearly raises investigation of potential claims in violation of
23 Federal Civil Rights that could have a wide range in impact on all
24 the cases handled by Judge Holland involving the Collin County
25 District Attorney's Office. Because In Re: Texas, the law

1 governing the Eastern District of Texas controls, Petitioner's
2 arguments fail. Clearly they raise a civil rights claim in the
3 Petition; the Petition is considered a civil action in the Eastern
4 District of Texas. Had Judge Holland and Mr. O'Connell lived in
5 Dallas and this matter had been brought in Dallas County, there may
6 have been a different result pursuant to the rule of law in the
7 Northern District of Texas. However, the Fifth Circuit has not
8 spoken on this issue, and in light of the much more thorough
9 analysis and better position adopted by the Eastern District of
10 Texas, In Re Texas controls.

11 **Petitioner Misguides the Court With His Argument that**
12 **Syngenta v. Henson Overruled the Rationale of In Re: Texas**

13 16. Petitioner boldly alleges that In Re: Texas was
14 subsequently rejected by the Supreme Court of the United States is
15 again without merit. The only purpose for which the Respondents
16 rely on In Re: Texas is to establish the rule of law that a Rule
17 202 Petition is a "civil action" for the purpose of removal.
18 Petitioner alleges that the All Writs Act, which is the basis of
19 removal in In Re: Texas, has been overruled and is no longer a
20 basis for removal. Petitioner would agree with this argument.
21 However, Respondents are not relying on the All Writs Act as a
22 basis of its removal, but rather the clearly stated federal claim
23 for violation of the Civil Rights Act, as plainly stated in Mr.
24 Hood's Rule 202 Petition. Mayfield-George, further states that
25 federal courts have inherent power to issue bills of discovery.

1 Mayfield-George, supra at 283-284. Judges and prosecutors have
2 defenses of qualified immunity under federal law, have protection
3 and rights to privacy and other guaranties in the United States
4 Constitution, which should be carefully analyzed in this case to
5 determine whether or not a deposition should be allowed of Judge
6 Holland and/or Mr. O'Connell. Therefore, the Federal Court is the
7 proper court to consider these issues.

8 **Respondent's Objection to Request for Immediate Remand**

9 17. Petitioners rely on the last minute urgency surrounding
10 the execution of Mr. Hood on September 10, 2008, in a rush to
11 justice, that is bound to affect the rights of Respondents. As
12 stated earlier, Petitioner has sought this relief for numerous
13 months in the 296th District Court and which is still available for
14 the relief sought herein. Instead Mr. Hood has chosen a civil form
15 as a last-ditch effort to delay his death.

16 18. Petitioner alleges that Respondents' removal was abusive
17 and improper given the national media attention and further
18 incorrectly base their pleadings on the flat lie that Judge Brewer
19 had directed Judge Holland and O'Connell to be prepared to be
20 deposed immediately following the hearing at 9:00 a.m. on Monday,
21 September 8, 2008. There was no direct order from Judge Brewer.
22 The only document containing such language is a Notice of Hearing
23 dated September 4, 2008 signed by Petitioner's San Francisco,
24 California attorney Gregory W. Wiercioch. Furthermore, the Notice
25 of Hearing and request to bring documents, is improper under Rule

1 202 Petition to Take Depositions. The only thing that the
2 Petitioner can do is to request a hearing wherein the Judge
3 determines whether or not a deposition should take place and there
4 is no provision under the Texas Rule that require an individual to
5 bring documents with him to such deposition.

6 **Respondent's Request for Payment of Costs and Expenses**

7 19. Based upon Petitioner's inability to identify the correct
8 law in the Eastern District of Texas to which this matter would
9 apply, and in further light of the abusive practices and emergency
10 motions filed that are clearly in connection with the criminal
11 matter, which has been severed and pending in the 296th District
12 Court, the actions by Petitioner has required Respondent's
13 immediate and significant response including significant attorney
14 fees and expenses which this Court should award to the Respondent.
15 Respondent requests the Court order Petitioner Charles Dean Hood,
16 and his attorneys, Gregory W. Wiercioch, 430 Jersey Street, San
17 Francisco, California 94114, A. Richard Ellis, 75 Magee Avenue,
18 Mill Valley, California 94941, and Kathryn M. Kase, Texas Defenders
19 Service, 412 Main, Suite 1150, Houston, Texas 77002 to pay such
20 costs and expenses.

21 WHEREFORE, PREMISES CONSIDERED, Respondent, HONORABLE VERLA
22 SUE HOLLAND, requests that Petitioner's Motion to Remand be denied,
23 and that the Court require Petitioner and his attorneys to pay all
24 just costs and expenses, including attorney fees, incurred as a
25 result of filing of Charles Dean Hood's petitions, and request for

1 immediate relief, and for such other relief as law and justice
2 requires.

3 Dated September 8, 2008.

4 Respectfully submitted,

5 /s/ Bill Boyd

6 BILL BOYD

7 Bar Card No. 02780000

8 BOYD-VEIGEL, P.C.

9 P. O. Box 1179

McKinney, Texas 75070

Telephone: 972/562-9700

Telecopier: 972/562-9600

10 Attorney for Respondent,

11 VERLA SUE HOLLAND

Certificate of Service

On this 8th day of September, 2008, the undersigned hereby certifies that a true and correct copy of the foregoing was sent to the following via email in accordance with the Texas Rules of Civil Procedure:

Gregory W. Wiercioch, Esq.
430 Jersey Street
San Francisco, CA 94114
832-741-6203
gwooch@texasdefender.org

Madeleine B. Connor, Esq.
Assistant Attorney General
300 W. 15th Street
William P. Clements Building
Austin, Texas 78701
512-463-2120
Madeleine.Connor@oag.state.tx.us

Kathryn M. Kase, Esq.
412 Main #1150
Houston, TX 77002
713/222-7788
KMKase@compassnet.com

Jeffrey Garon, Esq.
Assist. Criminal Dist. Atty.
2100 Bloomdale Road #20004
McKinney, TX 75701
972-548-4323
jgaron@co.collin.tx.us

Richard A. Sayles, Esq.
4400 Renaissance Tower
1201 Elm Street
Dallas, TX 75270
214-939-8700
Dsayles@swtriallaw.com

Service also to be provided to (via First Class Mail):

The Honorable John Nelms
4125 Normandy Avenue
Dallas, TX 75205

The Court of Criminal Appeals
P.O. Box 12308
Capitol Station
Austin, TX 78611

/s/ Bill Boyd
BILL BOYD